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**SUMMARY**

The Cedarville College urges the Commission to adopt comparative criteria in noncommercial educational hearing proceedings that reflect the Congressional intent to provide alternative programming and that reflect the importance of educational institutions in providing that programming.

Educational institutions applying for an authorization in their appropriate local area should receive a dispositive preference over educational organizations. Educational institutions have a record of providing service to the community and have the staff and resources needed to serve the community. Educational organizations should have the opportunity to prove that they will provide service comparable to that provided by educational institutions.

Applicants that do not receive public funds for operations or for capital improvements should receive a major preference over applicants that receive such funds. Such a preference would further the Congressional intent to make noncommercial educational broadcasters an alternative programming source. Applicants that are accredited by recognized regional accrediting entities should receive a substantial preference. Applicants who have existing resources that can be used to serve the public should receive a preference if they can show how those resources will be used to serve the public. An applicant that can show the existence

of unmet needs and can provide programming designed to meet those unmet needs should receive a preference. The Commission should also consider hours of operation on a comparative basis.

Diversification should not be a comparative factor unless an applicant has ties to a commercial station whose service area overlaps with the proposed NCE station. Comparative coverage should not be an important factor unless an applicant would provide a white or gray NCE service. Applicants who have a history of not constructing facilities should receive a significant demerit. An applicant who proposes to construct a local studio should receive a preference over an applicant who receives a waiver of the main studio rule if the applicant shows that the local studio will result in better service to the public.

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Reexamination of the )  
Comparative Standards for )  
New Noncommercial Educational )  
Applicants )

MM Docket No. 95-31

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To: The Commission

COMMENTS OF THE CEDARVILLE COLLEGE

The Cedarville College (Cedarville), by its attorneys, now offers its comments in response to the Notice of Proposed Rulemaking, FCC 95-79, released March 17, 1995 soliciting comments on revisions to the comparative criteria for applicants for new noncommercial educational stations.

**I. BACKGROUND**

Cedarville is an accredited independent private college located in Cedarville, Ohio. It is the licensee of noncommercial educational FM stations WCDR, Cedarville, Ohio, WOHC, Chillicothe, Ohio, and WOHP, Portsmouth, Ohio. It has been a Commission licensee since 1962. It is also an applicant for a construction permit for a new noncommercial FM station at Columbus, Ohio (File No. BPED-921104MA). That application is mutually exclusive with two other applications for the same frequency at Columbus.

Cedarville believes that the existing comparative criteria for NCE stations should be refined and made more specific. It believes the changes proposed below would provide applicants with a better understanding of their comparative strengths and weaknesses than the current vague criteria provide. More importantly, Cedarville believes that the criteria described below would result in the selection of broadcasters who are more likely to provide better service to the public.

Cedarville believes that the comparative criteria for noncommercial broadcasters should be different than the comparative criteria for commercial broadcasters because noncommercial stations are designed to provide a unique service. In fact, noncommercial broadcasters such as Cedarville do provide a unique service to the community. Cedarville believes one of the best predictors of service to the community is the applicant's knowledge of and connections with the community. Unlike most applicants for new commercial frequencies, which are often formed for the sole purpose of applying for a frequency, educational institutions have a history of providing service to the public by educating students, communicating the essence of the institution with its constituency, and playing active roles in their communities.

Cedarville believes that the noncommercial comparative criteria should reflect the standards listed in Section 73.502

of the Commission's rules for noncommercial stations. That rule provides:

In considering the assignment of a channel for a noncommercial educational FM broadcast station, the Commission will take into consideration the extent to which each application meets the requirements of any statewide plan for noncommercial educational FM broadcast stations filed with the Commission, provided that such plans afford fair treatment to public and private educational institutions, urban and rural, at the primary, secondary, higher, and adult educational levels, and appear otherwise fair and equitable.

In that rule, the Commission recognizes the importance of cultivating a diversity of educational programming services and the importance of educational institutions in providing that diverse service. The Commission's noncommercial comparative criteria should reflect the importance of programming diversity and of educational institutions.

## **II. PROPOSED COMPARATIVE CRITERIA**

### **A. Educational Institutions Versus Educational Organizations**

The Commission allows both educational institutions and educational organizations to become noncommercial licensees. Educational institutions (which are institutions that operate a bona fide fulltime school) are automatically eligible to become noncommercial educational licensees in the communities

where they operate schools.<sup>1</sup> Educational organizations can become eligible for an educational station in any community, but "they must demonstrate that they have an educational goal and are committed to the advancement of an educational program." See n.1, supra. An educational organization may establish the existence of an educational purpose by reciting that its stated purpose is "to develop educational programming for its community of license." Palm Bay Public Radio, Inc., 6 FCC Rcd 1772, 1773, 68 RR 2d 1566, 1569 (1991). An educational organization is not required to list all of its programming but is only required to state its programming policies and illustrative examples of programs. Id., 6 FCC Rcd at 1774, 69 RR 2d at 1569-1570.

Clearly, educational institutions must undertake a greater effort than educational organizations to become familiar with their service area and to serve their community. Educational institutions by their very mission must become familiar with their community and their students, establish an operating curriculum in order to teach their students, acquire the physical plant and trained personnel needed to teach their students, and continue to inform and service their alumni. It

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<sup>1</sup> The eligibility processing standards for noncommercial educational applicants were created in 1977 when the Commission issued its decision in Moody Bible Institute, 66 FCC 2d 162, 40 RR 2d 1264 (1977). The processing guidelines were later published in Notice of Inquiry in MM Docket No. 78-164, 43 FR 30842, 30844-30845 (1978) (Appendix A) and in Way of the Cross of Utah, Inc., 58 RR 2d 455, 457-458 n.5 (1985).



is beyond dispute that education is a vital function and that operating a school requires great effort and substantial resources. In performing their educational function, educational institutions must become intimately involved in their communities.

Educational organizations, on the other hand, are frequently corporations that are established for the sole purpose of applying for the frequency in question. They are often managed and controlled by people who do not live within their proposed service area and who have little familiarity with the service area. Some noncommercial licensees establish national networks which do little more than rebroadcast a signal beamed from a satellite. In the case of most educational organizations, the Commission has no basis for determining that the applicant is familiar with or involved in the community.

For those reasons, the record supports establishing a rebuttable presumption that educational institutions are more likely to serve the public interest than educational organizations. Accordingly, the Commission should award educational institutions a per se comparative preference over educational organizations unless the educational organization applicant makes a special showing that it is sufficiently familiar with its proposed service area and its needs and interests to allow the Commission to conclude that it will provide service comparable to the service an educational

institution would provide. In order to rebut the presumption in favor of educational institutions, an educational organization would have to show:

(a) that its owners and/or directors were active in the community and were familiar with the needs, interests, and problems of the community;

(b) that the applicant had undertaken efforts to ascertain the needs and interests of its proposed service area so that it was familiar with those needs and interests;

(c) that the applicant had proposed programming responsive to the needs and interests of its service area that were not being met by other stations in the service area; and

(d) that the applicant was proposing facilities comparable to those being provided by the educational institution (e.g., coverage area and hours of operation are comparable to those being offered by the educational institution).

If the educational organization were unable to rebut the presumption, the educational institution would receive a dispositive preference, and its application would be granted unless the institution lacked the qualifications necessary to become a Commission licensee. If the educational organization were able to rebut the presumption, the applicants would be

judged according to the other comparative criteria listed below.<sup>2</sup>

This criterion would result in better service to the public, would be easy to administer, and would protect the due process rights of all applicants. It would allow educational institutions, who are intimately involved in their communities, to use their knowledge and experience to further serve the public. Since the Commission already requires applicants to demonstrate whether they are educational institutions or educational organizations, the Commission already has the information needed to administer this criterion. On the other hand, educational organizations have an opportunity to demonstrate that they are familiar with the community and have plans to meet community needs.

Cedarville believes there must be a geographical limitation to the preference an educational institution would receive over an educational organization. For example, there would be no reason to award Cedarville a dispositive preference for a noncommercial FM station in California. In the case of a primary or secondary school or school district,

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<sup>2</sup> Cedarville is not asking the Commission to revise the basic eligibility criteria for noncommercial educational applicants. While it believes the record fully supports a presumption that educational institutions provide superior service, there are educational organizations that do provide service in the public interest. Furthermore, when there are no educational institutions that are able or willing to provide service to an area, it is appropriate to allow educational organizations to maximize the availability of noncommercial educational service to an area.

the appropriate geographical area would be the boundaries of the area served by that school or district, since that area represents the area where the applicant provides service. It is more difficult to determine the appropriate area for a college, university, or graduate school because such schools often recruit students and operate on a regional basis. On the other hand, if educational institutions are allowed to receive a preference in too large of an area, they could receive a preference in an area with which they actually have little familiarity. On balance, Cedarville believes that colleges, universities, and graduate schools should receive this preference in applying for noncommercial educational stations in the state in which they operate a bona fide school. Many public universities and colleges are explicitly designed to serve a given state, and many private colleges recruit substantial numbers of students from one or many states.

#### B. Major Comparative Criteria

If there is more than one mutually exclusive educational institution applicant, or if an educational organization is able to overcome the presumption in favor of the educational institution, the applicants would have to be compared using other comparative criteria. Cedarville believes there are comparative criteria that are entitled to substantial weight and other criteria that are entitled to lesser weight. Those criteria will be listed below.

# 1. Public Versus Private Funding

The Congress has explicitly recognized that the "expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both the local and national levels..." Section 396(a)(3) of the Communications Act, 47 U.S.C. §396(a)(3). In the Notice of Proposed Rulemaking, the Commission asked whether "a different comparative approach be followed for state-owned public broadcasters as opposed to other NCE applicants..." Private educational entities have historically been the foundation for this nation's education system, and they still play a vital role in that system, particularly at the college and university level. Any criteria that the Commission establishes must reflect the Congressional purpose of providing diverse programming and must recognize the importance of private educational institutions in providing that diversity. Indeed, Cedarville believes that it would violate the First Amendment of the United States Constitution and Congress' intent to encourage alternative programming sources to establish comparative criteria that favored state-owned broadcasters and broadcasters relying upon government funding over private educational broadcasters who were solely reliant upon listener donations and other sources of private funding. Indeed, Cedarville believes that applicants who do not rely upon government (federal, state or local) funding to operate their

broadcast operations should receive a major preference over broadcasters who are owned by a government or who are relying upon government funding.

It would be a violation of the guarantee of freedom of speech offered by the First Amendment of the United States Constitution and the Communications Act to offer governmental entities a preference over private entities for being government entities. Such a preference would act as a pernicious system of censorship in which the speech of government actors and those who accepted government funds would be preferred over private citizens. The award of such a preference would constitute discrimination against the viewpoint of a private actor in favor of the viewpoint of a government entity. Such discrimination is clearly prohibited by the First Amendment.

Furthermore, since one of the primary purposes of noncommercial educational programming is to provide alternative programming,<sup>3</sup> the Commission's comparative criteria should favor applicants who are independent of the government and are not relying on government funds to operate their station over government-owned stations and stations that are relying upon government funds. While Cedarville is not disputing the right of governmental agencies or public schools to be noncommercial educational licensees, such licensees can

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<sup>3</sup> See Section 396(a)(5) of the Communications Act, 47 U.S.C. §396(a)(5).

hardly be considered the "source of alternative telecommunications services" (emphasis added). If Congress and the Commission wish to develop diversity in noncommercial educational programming, the Commission must encourage private, independent educational institutions who are not dependent on government funding to become NCE licensees and provide the alternative viewpoints sought by Congress. Accordingly, the Commission should grant applicants who are not owned or controlled by any federal, state or local government and who do not receive any government funds for operation and/or capital improvements a major comparative preference over applicants who are owned or controlled by a government or who do rely upon government funds for station operations.

The evaluation and emphasis should be on achieving diversity and balance within the broadcast market in question. For example, in markets where there are public NCE stations, significant comparative credit should be awarded to an applicant representing an independent private voice so as to maximize the choices available to the public.

## 2. Accreditation

Applicants that are accredited by recognized regional accrediting entities should receive a significant comparative preference over applicants that are not accredited. In the ITFS service, the Commission awards merit points to accredited institutions for the following reasons:

These parties are the providers of education and are most likely to have the academic and staff resources, as well as the perspective, to develop educational programming to meet specific and current and future educational needs. Educational institutions are more likely to be attuned to the educational needs of the area and have developed relationships with significant members of the educational community more so than other organizations. Those institutions which are accredited demonstrate the best evidence that they are functioning at a level which meets, at minimum, standards prescribed by governmental or other recognized bodies responsible for formal education.

Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, 101 FCC 2d 49, 58 RR 2d 559, 572 (1985). Since NCE licensees are supposed to use their stations in furtherance of an educational program, the same reasoning should be applied in NCE comparative hearings. Accredited applicants should receive a substantial comparative preference over applicants that are not accredited.

### 3. Institutional Services and Support

Many noncommercial educational applicants have existing resources that could be used to provide better service to the public in connection with their proposed stations. These resources can take many forms. For example, a school may have professors, teachers and other staff as well as alumni and other competent professionals who could be used to provide educational programming. A noncommercial educational applicant that is the licensee of a nearby station could be



able to use personnel to improve service to the public at its proposed station. For example, the licensee could have news bureaus and personnel that could produce news and public affairs programming for the proposed station.

Applicants that have such resources available and are able to demonstrate how those resources can be used to meet the needs and interests of its proposed service area should receive a significant comparative preference. Cedarville does not intend that the examples listed above be the only circumstances in which an applicant could receive a preference for using existing resources to serve the public. In order to receive a preference under this criterion, applicants should be required to show how they will use these resources to serve its proposed service area.

#### 4. Program Diversity

Cedarville believes that an applicant who can demonstrate that it will provide programming that will meet an unmet need should receive a significant comparative preference. The Commission has said "that in the rare case where the commercial media market appeared to ignore a significant issue in a community, the public stations would be among the first to address it, providing an important alternative and competitive spur to the other local media." Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, 98 FCC 2d 746, 751, 56 RR 2d 1157, 1163-1164 (1984). If an applicant can demonstrate the

existence of unmet needs and interests, and can provide programming that would meet those needs and interests, that applicant should receive a significant comparative preference. In order to eliminate unnecessary litigation, an applicant seeking a preference under this factor should be required to make a threshold showing that there are unmet needs and interests in the service area and that the programming that the applicant believes will meet those needs and interests is not currently supplied by other stations in the market. See George E. Cameron Jr. Communications, 71 FCC 2d 460, 465-466, 45 RR 2d 689, 693-694 (1979).

#### 5. Hours of Operation

The Commission has previously considered substantial differences in hours of operation on a comparative basis. See Minneapolis Star & Tribune Co., 88 FCC 2d 1604, 1612, 50 RR 2d 1481, 1488 (Rev. Bd. 1982). The Commission should require applicants to state their proposed hours of operation, and it should award a significant comparative preference when there is a substantial difference in hours of operation. An applicant who proposes to remain silent during a substantial portion of the broadcast day would not be using scarce frequency resources efficiently and would not be taking full advantage of their opportunity to serve the public. The Commission should favor applicants who propose full-time operation.

C. Other Comparative Factors

1. Diversification

Cedarville believes that, in most cases, diversification should not be a comparative factor in noncommercial educational hearing cases. In the commercial radio context, the Commission has recognized in recent years that there has been a tremendous increase in available media outlets and that there are many operating efficiencies that can result from common ownership of stations in the same market. See Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 70 RR 2d 903 (1992) (subsequent history omitted). The Commission has historically not been as concerned about diversification in the noncommercial context. For example, the multiple ownership rules do not apply to noncommercial stations. Furthermore, Cedarville believes that the operating efficiencies that can result from operating multiple stations are particularly important for noncommercial educational stations, which operate with limited funds. For those reasons, Cedarville generally supports the holding in Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 259, 68 RR 2d 1043 (1991) that diversification is not a comparative factor in noncommercial educational comparative hearings.

Cedarville believes that an NCE applicant should receive a diversification demerit when a commercial station operating in the service area of the proposed NCE station has an

ownership interest in the proposed NCE market, or when a member of the NCE applicant's governing board is an owner of or affiliated with a commercial station whose service area overlaps with the service area of the proposed NCE station. While NCE stations are supposed to provide alternative programming to commercial stations, an NCE station that is owned or controlled by a commercial station is not providing an alternative voice in that market. The Commission should strongly discourage the use of NCE frequencies by commercial operators to avoid or to circumvent the commercial local ownership rules. If NCE stations are to provide alternative viewpoints and alternative programming, the Commission should encourage those stations to be independent of commercial stations in the same market. Accordingly, an NCE applicant with ties to a commercial station with an overlapping service area should receive a substantial diversification demerit.

## 2. Comparative Coverage

Cedarville believes that while comparative coverage should be a comparative factor, it should not be an important factor unless an applicant would provide a first or second NCE service to populations. It believes that there are sufficient differences between commercial stations and NCE stations to justify excluding commercial services in determining whether NCE applicants serve an underserved area.

### 3. Failure to Construct Facilities

Unfortunately, the Commission has been faced with many instances in recent years where applicants have received construction permits and have failed to build their stations. Such behavior is not in the public interest. The Commission is forced to devote resources to the processing of applications that do not result in service to the public. More importantly, the public is denied a new broadcast service. It is now common for applicants to file a large number of applications with the result that few or none of the stations applied for are actually constructed.

Cedarville urges the Commission to hold that when an NCE applicant (or its parties in interest) have held one or more construction permits for stations that were never built, there is a rebuttable presumption that the grant of that application would not be in the public interest. If the applicant could not show that (1) the failure to construct was for an unforeseeable reason beyond its control, and (2) it would be improper to draw an inference that there was reason to question the applicant's willingness and ability to build the station being applied for, the applicant would receive a substantial comparative demerit. If the applicant was able to make that showing, no comparative demerit would be charged.

### 4. Local Studio

Section 73.1125 of the Commission's rules requires all broadcast stations to locate their main studio within their

respective city grade contour. In the case of NCE stations, however, the Commission has liberally granted waivers of that rule because of the chronic financial problems faced by many NCE licensees. Nebraska Educational Television Commission, 4 RR 2d 771 (1965). Cedarville does not believe that the Commission's liberal waiver policy should be changed. An applicant which does propose to locate a main studio within its city grade contour may be able to demonstrate that it will provide superior service to an applicant that does not propose to locate its main studio within its city grade contour. When there are mutually exclusive applicants, and some (but not all) of the applicants have received a waiver of the main studio rule, the Commission should consider under the standard comparative issue whether the applicant proposing to locate its main studio within the city grade contour will use that studio to provide better service to the public. If so, a comparative preference should be awarded. In order to receive a preference, an applicant should be required to show that the studio will in fact result in better service to the public. No preference should be awarded merely for a proposal to build a studio in the city grade contour.

### **III. OTHER MATTERS**

Cedarville believes that the point system proposed by the National Federation of Community Broadcasters (NFCB) is too simplistic and would not necessarily result in the selection of the applicant that would provide the best service to the

public. Any simple point arrangement would fail to reflect the nuances that are present whenever the Commission makes the determination that the grant of one application over another would best serve the public interest, convenience, and necessity. For example, NFCB proposes that three points be awarded for diversification. If the Commission decides diversification should be a comparative factor, it would be illogical to give the same demerit to an applicant with a minority interest in a station 2000 miles away as an applicant with three stations in the same service area being proposed. The NFCB system would fail to reflect those differences. If the Commission adopts a point system and a tie occurs, the Commission should hold a hearing to reevaluate the issues and the weight of the points previously assigned.

Cedarville believes that the Commission should not continue to designate a mandatory "share-time" arrangement issue. In most cases, mandatory "share-time" arrangements between applicants who have not voluntarily agreed to such arrangements are unsatisfactory. "Share-time" arrangements are often confusing to the public, especially when the parties have different educational goals and philosophies. The Commission should continue to encourage voluntary "share-time" arrangements, but it should not impose mandatory "share-time" arrangements on unwilling applicants.

Once the Commission revises its comparative criteria, it should allow applicants a period to file amendments designed

to meet the new comparative criteria. Such amendments, however, should not be allowed to cure deficiencies unrelated to the new comparative criteria. For example, if an applicant lacks reasonable assurance of site availability, it should not be allowed to cure that deficiency by filing an amendment. If the Commission discovers that an applicant lacked the basic qualifications necessary to become a Commission licensee, the Commission should disregard any curative amendment filed by that applicant.

#### **IV. CONCLUSION**

Cedarville believes that the criteria described in these comments will result in the selection of applicants who are willing and able to provide quality service to the public. It believes that the Commission's overriding objective must be the design of criteria that will allow the Commission to expeditiously select permittees who can and will provide quality service. Cedarville agrees with the Commission that



this proceeding should be resolved expeditiously so that NCE comparative hearings can be expeditiously completed.

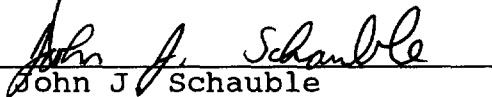
Respectfully submitted,

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